Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Appropriate Framework for Broadband	)	CC Dockets Nos. 02-33
Access to the Internet Over Wireline Facilities	)	
	)	
Universal Service Obligations of Broadband Providers	)	
	)	
Computer III Further Remand Proceedings:	)	CC Dockets Nos. 95-20,
98-10		
Bell Operating Company Provision of	)	
Enhanced Services; 1998 Biennial Regulatory Review –	)	
Review of Computer III and ONA Safeguards	)	
And Requirements	)	

COMMENTS OF THE TEXAS OFFICE OF PUBLIC UTILITY COUNSEL, CONSUMER FEDERATION OF AMERICA, CONSUMERS UNION, MEDIA ACCESS PROJECT, AND THE CENTER FOR DIGITAL DEMOCRACY

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SUMMARY

Congress clearly defined advanced telecommunications separately from information services and intended that these services be regulated. It required the FCC to conduct a regulatory forbearance proceeding (under §10 of the Act) if it desired to eliminate regulation. The FCC has steadfastly refuses to do so because it could not pass the test Congress established for deregulation. Instead, the FCC has adopted the myth of intermodal competition—or competition between a small number of facility owners--which is simply inadequate to achieve the outcome the FCC hopes for.

The empirical evidence demonstrates that intermodal competition will not produce a robust marketplace for information products or a vigorous marketplace of ideas for civic discourse.

- The majority of users, residential consumers and businesses, do not have a choice of technologies.

- Each of the technologies is suited to a different market segment – business are unlikely to use cable modem service, DSL service is ill-suited to residential, interactive video applications.

Cable and telephone companies have made a mockery of competition in the high-speed Internet market, using a variety of explicit and implicit strategies to eliminate competition including outright exclusion, architectural barriers, restrictions on service, and business leverage. They:

- withhold strategic inputs from potential competitors (i.e. blocking access to required equipment,

- create an artificial scarcity of capacity (bandwidth),

- dictate the deployment of technology and functionality to protect the core monopoly product and dictate the pace and type of innovation (i.e. configuring networks to prevent activities at the network owner's discretion),

- control the customer relationship (i.e. offer a restricted set of services to ISP thereby interfering with the customer relationship), and

- squeeze competitors by driving wholesale rates close to retail prices.

The results of these monopoly business practices and the FCC's policy are evident.

- In the dial-up (narrowband) Internet market, there are about 15 ISPs for every 100,000 Internet subscribers. In the high-speed (broadband) Internet market, there are fewer than 2 ISPs for every 100,000 customers.

- Affiliates of cable and telephone companies have a 95 percent market share on the broadband Internet, where they can exclude competitors, but only a 5 percent market share in the narrowband market, where they must compete fairly.

Lacking competition, the broadband Internet has exhibited the classic signs of market failure.

- Prices have been rising, in spite of declining costs.

- Adoption has been lagging.

- Innovation has been virtually nonexistent.

In failing to ensure effectively open communications networks for advanced telecommunications services, the Commission has undermined the primary goal Congress set for it in regard to the Internet – "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services." The Commission has incorrectly set out to promote small numbers competition in physical facilities at the expense of the very competition Congress required it to preserve. The Commission cannot adopt a policy that favors monopoly, when Congress has embraced policies that promote competition. The Commission simply cannot supplant its judgment about industrial policy for that of Congress.

I. BACKDOOR DEREGULATION WILL HARM CONSUMERS, UNDERMINE COMPETITION AND VIOLATES THE LAW

In initial comments, Joint Commenters have shown that the ongoing proceedings,[1] in which the Commission proposes to deregulate telecommunications markets before there is competition, are bad law and bad public policy.[2] The tentative conclusions and statutory construction offered by the Commission contradict the clear language and intent of the Telecommunications Act of 1996. The 1996 Act requires the Commission to preserve the consumer protection provisions of the Communications Act and promote the public interest through market opening policies that guarantee market forces are strong enough to ensure just and reasonable behavior by market participants **before** the Commission forbears from regulation. The statute does not allow the Commission to deregulate first and ask questions later. A broad range of commenters finds the Commission's statutory construction illegal and its public policy preferences unjustified, including other consumer groups,[3] state regulators,[4] independent Internet

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[1] The Commission has opened four proceedings that directly affect narrowband and broadband wireline services, in addition to one that affects cable modem service. Several commenters note that with an incredible number of moving parts, involving fundamental definitions as well as less regulatory details, it is virtually impossible to address the issues raised.

[2] "Comment of the Information Technology Association of America, *In the Matter of Review of Regulatory Requirements for Incumbent LEC Braodband Telecommunications Services,* CC Docekt NO. 01-331, March 1, 2002, pp. 24-25; ; "Comments of New Edge," *In the matter of Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities, Universal Service Obligations of Broadband Providers, Computer III Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer II and ONA Safeguards and Requirements*, Federal Communications Commission, CC Docket NO. 02-33, 95-20, 98-10, May 3, 2002, p. 2.

[3] All references are to initial comments in the instant proceeding, unless state otherwise. "Comments of Teletruth," "Comments of The Pennsylvania Office of Consumer Advocate, et. al;" "Comments of Arizona Consumer Coucil, et. al."

[4] "Comments of the Public Service Commission of Wisconsin;" "Comments of the New York State Department of Public Service;" "Comments of the People of the State of California and the California Public Utilities Commission," "Initial Comments of the Illinois Commerce Commission,"Comments of the Public Utilities Commission," "Coments of Vermont Public Service Board."

service providers (ISPs),[5] small and competitive local exchange carriers (CLECs),[6] and interexchange carriers (IXCs).[7]

Most importantly, the evidence in these proceedings shows overwhelmingly that there is not now adequate competition to ensure just, reasonable, and nondiscriminatory behavior by facility owners in the marketplace. The six year odyssey of foot dragging by incumbent local telephone monopolists to resist market opening and the five year campaign of cable video monopolists to extend their anticompetitive business model to the advanced telecommunications services that they provide have effectively undermined competition. Competitors have been driven into bankruptcy, consumers have few choices, prices are rising, and innovation has been chilled.

II. TELECOMMUNICATIONS MARKETPLACE REALITY CONTRADICTS THE THEORY OF INTERMODAL COMPETITION

The Commission's fanciful theories of intermodal competition need a reality check. Perhaps a stiff dose of Yankee common sense will do, as the New Hampshire ISP Association pointed out

> We fail to share the Pollyanna vision that sees marketplace solutions in the absence of markets. Unless we actually reach the point of having half a dozen

[5] "Coments of Ohio Internet Service Providers, et. al.," "Comments of the Association of Communications Enterprises," "Comments of AOL Time Warner, Inc." "Joint Comments of KMC and Nuvox Communications Inc.," Comments of Business Telecom, Inc., et. al.," "Comments of Earthlink," Comments of DirecTV, Inc.," "Comments of the American ISP Association," "Comments of Covad Communications Inc.,".

[6] "Comemnts of Cinergy," "Comments of Allegiance, Teelcom, Inc.," "Comments of National Telecommunications Cooperative Association," "Comments of Beacon Telecommunications Advisors, LLC," "Comments of Fred Williamson and Associates."

[7] "Initial Comments of Sprint," "Comments of AT&T, Corp."

different companies' wires running along the roads, we do not believe it will behave like a free market.[8]

This common sense approach is perfectly consistent with sound economic thinking and theory. As we pointed out in our initial comments, the six equal-sized competitor standard is the Department of Justice threshold for a highly concentrated market.[9] Sound economic thinking teaches that we would still need policies to promote intramodal competition because the economics of facility deployment will simply not produce a sufficient number of competitors to create the strong market forces that the Communications Act requires.

The attached study, prepared by the Dr. Mark Cooper for the Consumer Federation of America and the Texas Office of Public Utility Counsel,[10] shows that even if there were two, well-matched technologies delivering telecommunications services, as the Commission hopes, economic theory and the overwhelming weight of empirical evidence demonstrates that this would not be enough to ensure vigorously competitive markets that protect consumers from unjust, unreasonable and discriminatory practices. If the Commission sacrifices intramodal competition on the alter of intermodal competition, the public will end up as the victims of, at

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[8] "Comments by the New Hampshire ISP Association," p. 8.

[9] "Comments of Arizona Consumers Council," p. 58. For an extensive discussion see, , "Comments of the Consumer Federation of America, Consumers Union, Center for Digital Democracy, The Office of Communications of the United Church of Christ, Inc., National Association of Telecommunications Officers and Advisors, Association for Independent Video Filmmakers, National Alliance for Media Arts and Culture, and the Alliance for Community Media." Federal Communications Commission*, In the Matter of Implementation of Section 11 of the Cable Television Consumer Protection and Competition Act of 1992 Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996 The Commission's Cable Horizontal and Vertical Ownership Limits and Attribution Rules Review of the Commission's Regulations Governing Attribution Of Broadcast and Cable/MDS Interests Review of the Commission's Regulations and Policies Affecting Investment In the Broadcast Industry Reexamination of the Commission's Cross-Interest Policy*, CS Docket No. 98-82, CS Docket No. 96-85, MM Docket No. 92-264, MM Docket No. 94-150, MM Docket No. 92-51, MM Docket No. 87-154, January 4, 2002.

best, an unnatural duopoly. Worse still, the differences between the technologies and their uneven deployment, the experience since the passage of the Telecommunications Act of 1996 and the long history of behavior of the incumbent cable and telephone wire owners indicates that there is little chance that they will compete head-to-head.[11]

The Commission's daydream of intermodal competition cannot substitute for real market forces and real competition.

A. THE FAILURE OF COMPETITION BETWEEN FACILITY OWNERS

The number of facilities is small and the technological characteristics different, so that vigorous head-to-head competition is muted. For advanced telecommunications service, a substantial part of the residential customer class (40 to 60 percent) and virtually all of the business customer class there is no intermodal competition.[12] The majority of customers in this country has only one technology available for advanced telecommunications services – either a cable wire or a telephone wire. Wireless technologies are simply not an economic option today for advanced telecommunications, and there is great uncertainty about whether they ever will be.[13]

For basic telecommunications services, the situation is about the same. Facilities-based competition remains in its infancy. Where competitors have deployed facilities, they remain dependent on the use of large parts of the incumbent's network to deliver service.[14] Wireless is

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[10] Cooper, Mark, *The Importance of ISPs in the Growth of the Commercial Internet* (Consumer Federation of America and Texas Office of Public Utility Counsel, July 1, 2002).
[11] Cooper, 2002, pp. 18-19.
[12] Forty percent appear to have one or the other and a significant segment of the residential class has neither. The overwhelming majority of business have only one technology available, Cooper, 2002, pp. 18.
[13] Cooper, 2002, pp. 19. Whether wireless is a substitute for plain old telephone services is debatable (Comments of Arizona Consumers Council, pp. 59-61).
[14] Comments of Arizona Consumers Council, pp. 102-103.

not a substitute for basic telecommunications service, or for a bundle of basic and advanced telecommunications services.

Looking carefully at specific product and geographic markets reveals little competitive overlap of different facilities.[15] It has been apparent from the beginning of high-speed service that technological differences give different facilities an edge in different customer and geographic markets. Businesses are disinclined to use cable; DSL, as deployed is ill suited to multimedia video applications; low-density areas are not prime candidates for wired technologies.

B. AN ANTICOMPETITIVE TRACK RECORD

To make matters worse, the dominant facility owners have a thoroughly anticompetitive DNA. If the incumbent cable and telephone companies had behaved in a procompetitive and proconsumer manner consistent with the Telecommunications Act for the past six years, the Commission's hope that intermodal competition would eventually rescue consumers might be at least a little plausible, but the real world behavior of these monopolists extinguishes any glimmer. The record of anticompetitive behavior within and across the telecommunications and video markets is a stunning indictment of the theory of intermodal competition.[16] The best evidence of what will and will not happen, should the Commission abandon intramodal competition, is the experience of what did and did not happen in the past six years, in the market where these two wireline incumbents have bumped into each other – the market for advanced telecommunications services that delivers high-speed Internet access service. They have made a mockery of competition. What did happen is that incumbent cable and telephone monopolists put

[15] Cooper, 2002, p. 19.
[16] Cooper, 2002, pp. 19-21; Comments of the Arizona Consumers Council, pp. 85-103.

forth a strenuous effort to foreclose their markets to competitors. The strategy is identical in both cases

- Withholding strategic inputs from potential competitors
- Control the technology and functionality to protect the core monopoly product and dictate the pace and type of innovation
- Control the customer relationship.
- Squeeze the competitors by driving wholesale prices close to retail.

The effects of this lack of competition are apparent. In several other proceedings many of the groups joining in these comments have shown that intermodal competition is feeble in the multichannel video product space.

Even where there are two technologies available, they are not well matched as competitors and they have not exhibited strong rivalry.[17] With costs falling and demand lagging in the midst of a recession, both cable operators and telephone companies raised prices. Cable companies imposed a severe interruption of service on their customers, which, in a highly competitive market, would have been suicidal. Telephone companies continue to impose long installation times and service interruptions on DSL customers of their competitors. Innovation is absent in this product space.

The notion that there are significant areas of the country where a marketplace for network elements exists in which new entrants could buy services at prices that would not impair their ability to provide service is absurd. Were the Commission to withdraw the availability of network elements at the TELRIC prices recently upheld by the Supreme Court, it would

[17] Cooper, 2002, 20-21.

extinguish the remnants of the competitive local exchange industry that has already been devastated by the twin plagues of incumbent obstinance and regulatory ineptitude in market opening.

III. PRESERVING VIBRANT COMPETITION ON THE INTERNET REQUIRES UNFETTERED DEVELOPMENT OF SERVICES

A. THE ROLE OF ISPS IN THE COMMERCIAL SUCCESS OF THE INTERNET

Independent Internet service providers, who number between 7,000 and 8,000, have played a key role in making the Internet accessible to the public by buying wholesale telecommunications service from telephone companies and selling basic Internet access and a variety of additional services to the public (see Exhibit 1).[18] The critical role of ISPs in driving Internet adoption should not be underestimated.

Once the Internet was commercialized, ISPs rapidly covered the country with dial-up access and translated a series of innovations into products and services that were accessible and useful to the public, quickly turning the Internet into a mass-market product. Some of the underlying innovations had been around for a while like the Internet protocol itself, e-mail, file transfer and sharing, and bulletin boards. Some of the innovations were very recent, like the web, the browser, instant messaging and streaming. Thousands of ISPS tailoring services to customer needs supported the rapid spread of Internet subscription and use.

A close look at the data indicates that there is a real sense in which the Internet, delivering access to the World Wide Web rendered accessible by the browser, became the killer application for the PC (see Exhibit 2).[19] Although the PC had enjoyed success prior to the

[18] Cooper, 2002, pp. 5-6.
[19] Cooper, 2002, 6-11.

creation of the ISP industry, it was only after the advent of the business of selling Internet access service to the public that PC sales exploded.

B. Facility Owners have Foreclosed Advanced Telecommunications Services to Strangle Competition for Internet Service

This is exactly the business that the FCC policy of allowing facility owners to discriminate against unaffiliated ISPs in the provision of advanced telecommunications services will destroy. Indeed, the independent business of buying telecommunications services and selling Internet access service has been all but eliminated from the high-speed Internet market by the withholding of advanced telecommunications services.[20]

After five years there are no more than a handful of independent ISPs who have been allowed to sell high-speed Internet access over cable's advanced telecommunications network. The terms and conditions under which these few are allowed to do so are so onerous that the independent ISPs have virtually no ability to compete with the incumbent cable operators.

Although telephone companies have been ostensibly required to provide access to their advanced telecommunications networks, they have made life miserable for the independent ISPs. As a result, only about 100 have managed to fight their way onto the advanced telecommunications network of the telephone companies.

The impact of the market foreclosure on the high speed Internet access market has been devastating (see Exhibits 3 and 4). Throughout the history of the commercial narrow-band Internet, the number of service providers was never less than 10 per 100,000 customers. At present, and for most of the commercial history of the industry, there have been 15 or more ISPs per 100,000 subscribers. On the high-speed Internet there are now less than 2 ISPs per 100,000

[20] Cooper, 2002, pp. 28-31.

customers. For cable modem service there is less than 1 Internet service provider per 100,000 customers. For DSL service, there are fewer than and 2.5 ISPs per 100,000 customers.

The foreclosure of the market to independents is even more profound than these numbers indicate. Approximately 95 percent of the high-speed Internet access service customers are served by ISPs affiliated with either cable companies or telephone companies.[21] The fact that control over the wires is the cornerstone of this market foreclosure is demonstrated by the failure of the cable and telephone affiliated ISPs to have any success in the competitive narrowband Internet market. Cable companies have not sold Internet service in any product and geographic market where they do not control a monopoly wire. Telephone companies have done very poorly as ISPs in the dial-up market. Consequently, 95 percent of the customers in the dial-up market take their service from independent IPSs – treating AOL as an independent in the dial-up market. In other words, incumbent monopolists have a 95 percent market share where they can leverage their market power over their wires, and a 5 percent market share where they cannot.

It may well be, as some have suggested, that the Internet service market was due for some consolidation. However, this process is more like strangulation through the exercise of market power. By cutting off access to advanced telecommunications service – the oxygen of the Internet market – facility-owners have eliminated the competition. The actions suggested by these notices would make matters worse, giving official legitimacy to these anticompetitive tactics.

[21] Cooper, 2002, p. 28.

IV. THERE IS NO REASON TO BELIEVE THAT ALLOWING THE INCUMBENTS TO WITHDRAW WHOLESALE ADVANCED TELECOMMUNICATIONS SERVICE WILL STIMULATE COMPETITION

If the incumbent cable and telephone companies had behaved in a procompetitive and proconsumer manner consistent with the Telecommunications Act of 1996, for the past six years, the Commission's hope that intermodal competition would eventually rescue consumers might be at least a little plausible, but the real world behavior of these monopolists extinguishes any glimmer. The record of anticompetitive behavior within and across the telecommunications and video markets is a stunning indictment of the theory of intermodal competition.

A. THE FAILURE OF INCUMBENT FACILITY OWNERS TO COMPETE

The best evidence of what will and will not happen, should the Commission abandon intramodal competition, is the experience of what did and did not happen in the past six years.[22] What did not happen is that cable and telephone companies did not compete. While public policy attention is frequently focused on the new entrants, it is the failure of the incumbents to compete with one-another that is the greatest failure of the Telecommunications Act of 1996. Cable and telephone companies were the best suited to attack each other's markets, but they failed utterly to do so.

- Telephone companies have refused to compete with each other, choosing instead to buy one another out.
- Telephone companies have refused to enter the long distance business in a significant way, except in their monopoly local service areas.
- Telephone companies have failed to go into the multichannel video business.
- Cable companies have refused to compete with each other, choosing instead to buy one-another out.

[22] Cooper, 2002, pp. 19-20.

- Cable companies have been extremely slow to go into the telephone business.

What did happen is that incumbent cable and telephone monopolists put forth a strenuous effort to foreclose their markets to competitors. The strategy is identical in both cases

- Restrict the technology and functionality to protect the core monopoly product and dictate the pace and type of innovation.
- Withhold strategic inputs from potential competitors.
- Control the customer relationship.
- Squeeze the competitors by driving wholesale prices close to retail.

Each of these industries has simply defended and strengthened its hold on the core monopoly service it provides, eschewing entry into established product and geographic markets where entrenched monopolists exists. They never go where the going would be tough.

In the one area where these two monopolists have bumped into one another – the new market for advanced telecommunications services that delivers high-speed Internet access service – they have made a mockery of competition.

- They coincidentally increased prices.
- They have run parallel anticompetitive attacks on unaffiliated Internet service providers.
- They have both imposed severe supply disruptions on the public.

Cable and Telephone Company promises to allow click through access to the Internet gloss over the fact that by foreclosing the access to wires they have monopolized the business of selling Internet access to the public.

B. ONE CLICK IS TOO MUCH: DISCRIMINATION IN CLOSED, PROPRIETARY NETWORKS

Throughout the debate over non-discriminatory access to advanced telecommunications services Joint Commenters have articulated a framework for evaluating the terms and conditions for access being offered by incumbent monopolist facility owners that has been consistently applied to both cable modem service and DSL service.[23]

Cable and telephone companies have used a variety of explicit and implicit strategies to eliminate competition. The FCC's has declared cable's exclusionary practice to be legal, notwithstanding the fact that cable operators prevent 99.9 percent of ISPs from selling Internet access over cable's advanced telecommunications networks.

In addition to explicit exclusion, cable and telephone companies engage in a range of other practices that undermine competition.

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[23] *Transforming the Information Superhighway into a Private Toll Road: The Case Against Closed Access Broadband Internet Systems* (Consumer Federation of America and Consumer@ction, September 1999, first showed the parallel between cable operator policies and DSL network owner policies. The analytic framework that categorized discrimination according to Lawrence Lessig's modalities of regulation (*Code and Other Laws of Cyberspace* [New York: Basic Books]) was introduced in *Creating Open Accessto the Broadband Internet: Overcoming Technical and Economic Discrimination in Closed Proprietary Networks* (Consumer Federation of America, December 1999). Extensive definitions of the various forms of discrimination were first presented in *Who Do You Trust? AOL and AT&T… When they Challenge the Cable Monopoly Or AOL and AT&T… When They Become the Cable Monopoly?* (Consumers Union, Consumer Federation of America and Media Access Project, February 2000), which form the basis for a "Petition to Deny of Consumers Union, Consumer Federation of America and Media Access Project and Center For Media Education," *In the Matter of Application of America Online Inc. and Time Warner, Inc. for Transfers of Control,* Federal Communications Commission, Docket NO. CS 00-30. Academic presentation of the framework can be found in Cooper, Mark, 2000. "Open Access to the Broadband Internet: Technical and Economic Discrimination in Closed Proprietary Networks," *University of Colorado Law Review,* 71; and Cooper, Mark N. and Christopher Murray, *Technology, Economics And Public Policy To Create An Open Broadband Internet,* The Policy Implications of End-to-End, Stanford Law School, December 1, 2000.

Policies of Exclusion: To prevent competitors from getting a head start, the incumbent who controls the network refuses to make the underlying wholesale service available to competitors, until it has fully developed its own retail offering even though the wholesale components are clearly available.

Architectural Barriers: The technical capabilities of the network controlled by the proprietor can be configured and operated to disadvantage independent ISPs by preventing certain types of activities the network owner simply does not want to allow or by restricting an independent ISP while not restricting an affiliated ISP.

Restrictions on Service: The network owner can place restrictions on how non-affiliated service providers may use the network. For example, preventing independent ISPs from delivering services to consumers by restricting speed, duration of transmission, or other operational characteristics— one result of such restrictions would limit an independent ISP from delivering streaming video to its customers.

Business Leverage: By imposing onerous terms and conditions on information, pricing, product bundling and customer relationships, network owners insert themselves in the relationship between the customer and the independent ISP in such a way as to ensure that its affiliated ISP has a price, product or customer care advantage.

In the context of these anticompetitive practices, cable and telephone companies promise to allow one-click access to the Internet as a 'guarantee' that their business models will not undermine the dynamic nature of the information environment. The promise is laughable. One click access glosses over the fact the consumer must click through architectural principles, usage restrictions and business relationships that are anathema to innovation on the Internet.

- Wire owners monopolize the access business and leverage their market power to undermine competition.
- The click-through-only approach does not allow independent ISPs to compete for consumer dollars until after the cable and telephone companies have charged consumers between $40 and $50 for Internet access. The price is too high and allows the network owner to cross subsidize its own affiliated ISP.
- By putting the price so high, it undercuts any serious opportunity to compete because there is little discretionary income to compete for.
- It does not address architectural decisions that restrict bandwidth or undermine the development of disruptive services.
- It does nothing to address the problem that the wire owner is still in control of functionality. The network owner retains the right to impose restrictions on the products and functionalities that independent ISPs can offer to the public by imposing acceptable use policies as a business strategy.

V. THE COMMISSION MUST ABANDON ITS BACKDOOR DEREGULATION AGENDA

Even without intentional anticompetitive behavior, closure of the platform imposes a cost in two ways, by distorting incentives for innovation and undermining institutional options. Restricting the range of experimentation and shifting incentives reduces the quality and quantity of innovation and innovators because it shifts the balance between incumbents and disruptive entrants. The hand of incumbents, who shy away from disruptive innovation, would be strengthened. Incumbents behave rationally by developing their core competence and seeking

structures that reward it. The dominant commercial firms have incentives to expand by commercializing, concentrating, and homogenizing information space.

The irony is that Congress understood this well. It supported three modes of entry, required competition before deregulation, and set out specific, rigorous conditions under which regulation could be relaxed. The correct public policy is to stimulate small numbers competition in physical facilities and preserve large numbers competition in applications and content. Congress clearly intended this outcome and gave the FCC the tools to accomplish it. The FCC's shift to a reliance on intermodal competition at the expense of intramodal competition would contradict Congressional intent and subject consumers to great risk of the abuse of market power, slowing innovation and strangling competition.

In the face of the overwhelming evidence of anticompetitive behavior and the avoidance of competition, the Commission must abandon its backdoor deregulation agenda. The Commission simply cannot ignore the law to pursue a preset agenda. We called it legal gymnastics, the Wisconsin Public Service Commission calls it legal jujitsu, and it is clear to the vast majority of commenters that the legal flip flop contradicts the statute and reverses, without justification, three decades or clearly articulated Commission policy.

The concern expressed among commenters is that the outcome is "preordained" and this is a growing problem with Commission policy.[24] Chairman Powell wasted little time in showing his preferences, stating in his first press conference as Chairman that

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[24] Chairman Powell has made his personal agenda so clear that even appeals court Judge has been driven to comment on his widely publicized preferences (e.g. Judge Sentelle, Concurring and Dissenting in Part," *Sinclair Broadcast Group, Inc. v. Federal Communications Commission*, April 2, 2002) and well-respected newspapers routinely score decisions on the extent to which they further the Chairman's private agenda:

> While technically a defeat for the Commission, which was the defendant in the case, the decision was a political victory for its Chairman, Michael K.

> I don't see deregulation as the dessert you serve after people eat their vegetables-a reward…I fundamentally disagree with the idea that deregulation is something to be handed out only after competition is found to exist.[25]

Under section 10 of the Act that is exactly what must be done to legally forbear from regulation.

Just two months earlier he had expressed his preference for deregulation and a narrow view of consumer protection under the guise of stimulating innovation.

> And it is the unleashing of the power of "creative destruction," the phrase coined by the late great economist Joseph A. Schumpeter, who is celebrated increasingly as the father figure of the New Economy. Schumpeter saw that technological change "incessantly revolutionizes the economic structure from within." Rather than talk of "reform," a relatively pedestrian, incremental notion, we need to consider the Schumpeterian effect on policy and regulation…
>
> In a Schumpeterian New Economy where such forces are the engines of prosperity, we must foster competitive markets, unencumbered by intrusions and distortions from inapt regulations. And, most importantly, we have to be careful to see speculative fear and uncertainty in this innovation-driven space for what it is, and not prematurely conclude we are seeing a market failure that justifies regulatory intervention. Moreover, consumer protection is important, but it should be just that and not a straw man for engaging in industrial policy.[26]

At its root, however, this Schumpeterian call for deregulation is basically a defense of monopoly, a sentiment that has made its way explicitly into a recent Commission notice "[s]ome economists, most notably Schumpeter, suggest that monopoly can be more conducive to innovation than competition, since monopolists can more readily capture the benefits of

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> Powell…Mr. Powell has already expressed skepticism about the rules and is in the middle of a review of them that experts predict will lead to their substantial modification in favor of the regional Bell Companies (Labaton, Stephen, "U.S. Appeals Court Order Is Victory for Regional Bells," *New York Times*, May 25, 2002).

[25] February 8, 2001.

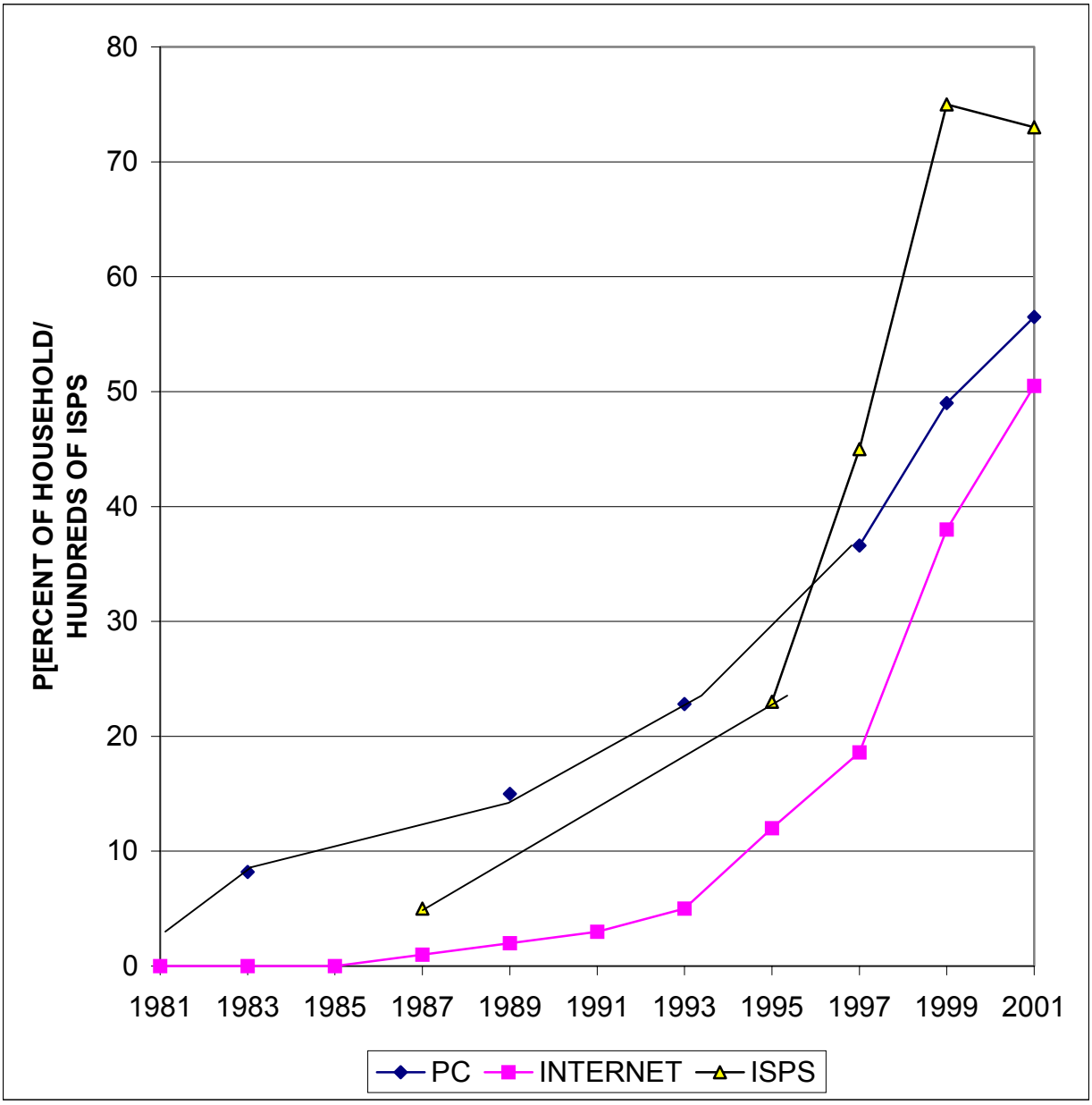
[26] "The Great Digital Broadband Migration," *Progress and Freedom Foundation*, December 8, 2000.

innovation ."[27] The Commission simply cannot adopt a policy that favors monopoly, when Congress has embraced policies that promote competition. The Commission simply cannot supplant its judgment about industrial policy for that of Congress.

[27] "Further Notice of Proposed Rulemaking," *In the Matter of Implementation of Section 11 of the Cable Television Consumer Protection and Competition Act of 1992, Implementation of Cable Act Reform Provisions of the 'Telecommunications Act of 1996, The Commission's Cable Horizontal and Vertical Ownership Limits and Attribution Rules, Review of the Commission's Regulations Governing Attribution of Broadcast and Cable MDS Interests, Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry, Reexamination of the Commission's Cross-Interest Policy,* CS Docket Nos. 98-82, 96-85; MM Docket Nos. 92-264, 94-150, 92-51, 87-154, September 13, 2001, para. 36.

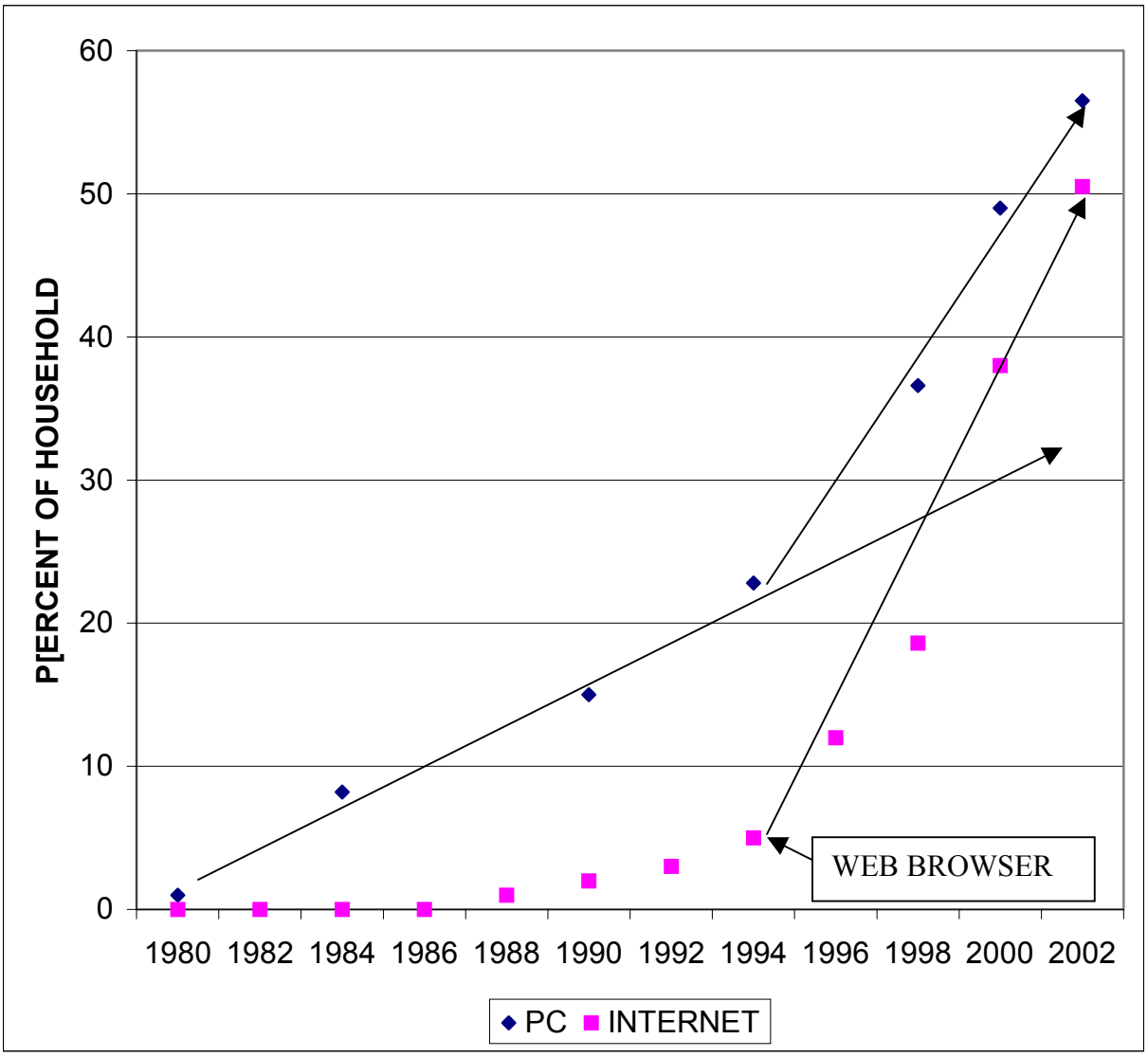
EXHIBITS

EXHIBIT 1:
ISPS, INTERNET SUBSCRIPTION AND HOME PC PENETRATION



Source: Carey, John, "The First Hundred Feet for Households: Consumer Adoption Patterns," in Deborah Hurley and James H. Keller (Eds.), *The First Hundred Feet* (Cambridge: MIT Press, 1999); National Telecommunications Information Administration, *A Nation Online* (U.S. Department of Commerce, 2002). Early ISP counts are discussed in Mark Cooper, *Expanding the Information Age for the 1990s: A Pragmatic Consumer View* (Consumer Federation of America, American Association of Retired Persons, January 11, 1990), see also Janet Abbate, *Inventing the Internet* (Cambridge: MIT Press, 1999) and Matos, F., *Information Service Report* (Washington, D.C.: National Telecommunications Information Administration, August 1988). Recent ISPS Counts are from *Boardwatch Magazine*, "North American ISPS," mid-year estimates. For high speed ISPs see Federal Communications Commission, *High-Speed Services for Internet Access,*" various issues.

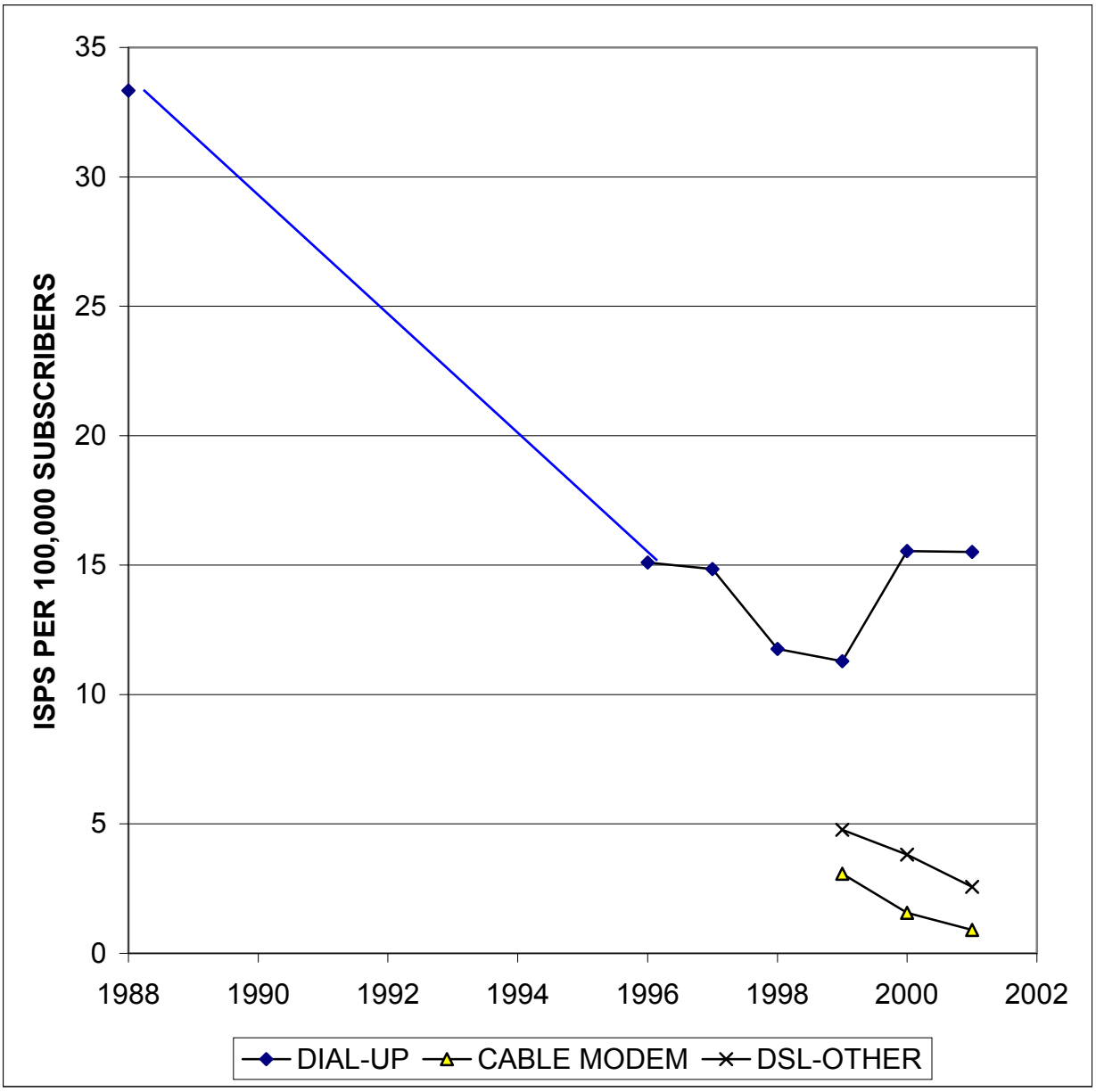
EXHIBIT 2:
THE INTERNET WAS THE KILLER APPLICATIONS FOR THE PC



Sources: See Exhibit 1.

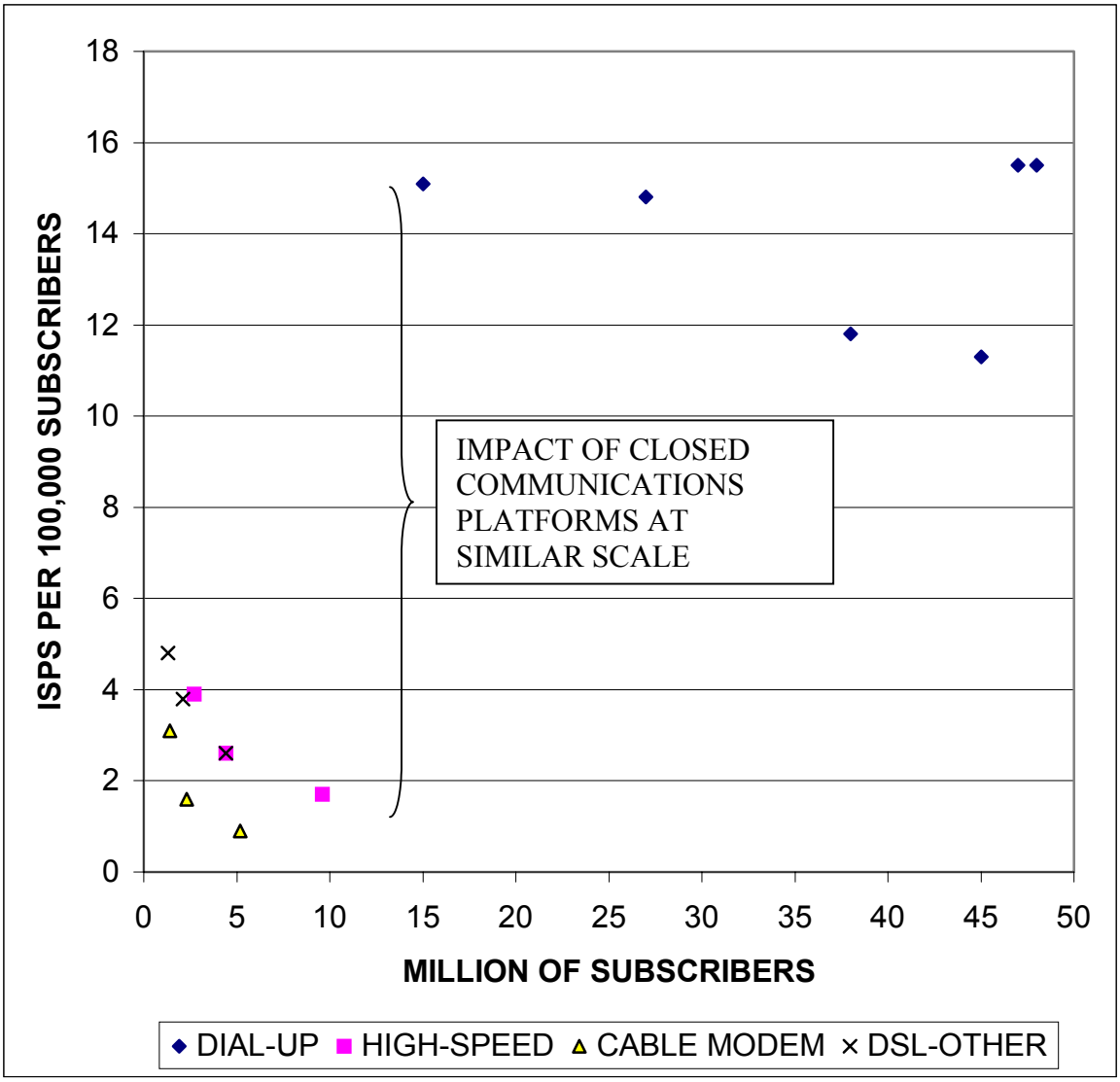
EXHIBIT 3:

DENSITY OF INTERNET SERVICE PROVIDERS BY DATE



Source: See Exhibit 1.

EXHIBIT 4:
DENSITY OF INTERNET SERVICE PROVIDERS BY MARKET SIZE



Source: See Exhibit 1